Supreme Court, U.S.
FILED
NOV 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

(1)

NO. 85-1433

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

GLORIA RICHARDSON, WARDEN,

PETITIONER

vs.

CLARISSA MARSH, RESPONDENT

REPLY BRIEF OF PETITIONER

JOHN D. O'HAIR
Prosecuting Attorney
County of Wayne

TIMOTHY A BAUGHMAN
Chief of the Criminal Division,
Research, Training and Appeals
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5792

STATEMENT OF THE QUESTION

IS THE ISSUE AS PRESENTED PROPERLY BEFORE THIS COURT?

INDEX OF AUTHORITIES

CASE PAGE

Dewey v Des Moines,
173 US 193, 197-198 (1898)..... 6

Stanley v Illinois,
405 US 104 (1972)..... 7

TABLE OF CONTENTS

PAGE

INDEX OF AUTHORITIES..... 3

STATEMENT OF QUESTIONS..... 1

OPINIONS BELOW..... 4

STATEMENT OF JURISDICTION..... 4

CONSTITUTIONAL PROVISIONS INVOLVED... 4

REPLY ARGUMENT..... 6

CONCLUSION..... 9

OPINIONS BELOW

The opinion of the Federal District Court is appended as Appendix A to the Petition for Certiorari. The opinion of the Sixth Circuit Court of Appeals is reported at 781 F 2d 1201 (CA 6, 1986).

STATEMENT OF JURISDICTION

The judgment of the Sixth Circuit of the Court of Appeals was entered on January 23, 1986. The jurisdiction of this Court is invoked under 28 USC Sec 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws.

The Sixth Amendment to the United States Constitution provides, in part, that "in all criminal prosecutions the accused shall enjoy the right...to be confronted with the witnesses against him."

REPLY ARGUMENT

Petitioner wishes briefly to reply to only one portion of Respondent's argument; namely, that portion where Respondent alleges that a portion of Petitioner's argument is not properly before this Court. In so doing, Respondent misperceives the import of the "not pressed or passed upon below" doctrine. Petitioner will briefly demonstrate that the arguments presented are properly before this Court.

It has long been settled that the "not pressed or passed upon below" doctrine does **not** mean that every **argument** in support of an **issue** must have been pressed upon below--what is required is that the **issue** have been pressed and passed upon below. In Dewey v Des Moines, 173 US 193, 197-198 (1898) this

Court said:

> If the question were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in substance as to form but another ground or reason for alleging the invalidity of the personal judgment, we should have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued. Parties are not confined here to the same arguments which were advanced below upon a federal question there discussed (emphasis added).

See also Stanley v Illinois, 405 US 104 (1972).

The issue in this case is whether Respondent's confrontation rights were violated by the admission into evidence of her codefendant's redacted confession (admitted with a cautionary limiting instruction). The argument advanced below by Petitioner was that contextual implication cannot be employed to find a confrontation violation, an argument

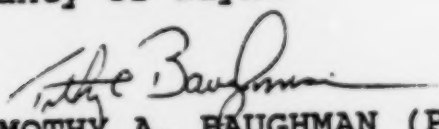
Petitioner continues in this Court. However, even if contextual implication is employed to conclude that the jury likely disregarded the cautionary limiting instructions, if the codefendant's confession is admissible via a hearsay exception <u>against</u> Respondent, Respondent's confrontation rights would nonetheless be intact. Petitioner has thus not attempted to add a new issue in this Court, but "another ground or reason" why confrontation principles are not violated in this case. This is wholly proper.

CONCLUSION

Wherefore, Petitioner respectfully requests that the Sixth Circuit Court of Appeals be reversed.

Respectfully submitted,

JOHN D. O'HAIR
Prosecuting Attorney
County of Wayne



TIMOTHY A. BAUGHMAN (P-24381)
Chief of the Criminal Division
Research, Training and Appeals
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5792